



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 3, 2005

Ms. Anne Constantine  
Legal Counsel  
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P. O. Box 619428  
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OR2005-04858

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225434.

The Dallas-Fort Worth International Airport Board (the "board") received a request for two bid packages related to custodial and landscaping services at Terminal D. You make no arguments and take no position as to whether the submitted information is excepted from disclosure, but state that the request may implicate the proprietary interests of third parties. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified SPC Airport Services, Inc. ("SPC") and Members Building Maintenance, Ltd. ("Members") of the request for information and of their right to submit arguments explaining why the information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received a brief from Members in which it raises sections 552.104 and 552.110 of the Government Code. We have received a brief from SPC in which it raises sections 552.110 of the Government Code. We have considered their arguments and reviewed the submitted information.

Initially, we note that Members has submitted comments arguing that its bid response should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage

to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the board does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).<sup>1</sup> Therefore, the board may not withhold any portion of the proposal pursuant to section 552.104.

Now we will address the remaining arguments of Members and SPC. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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<sup>1</sup>Members argues that “in the current case, [the board] has not waived this exception.” However, as the board has not requested a ruling on section 552.104 within the required ten-day deadline from its receipt of the request, we find that the board has waived this exception. *See* Gov’t Code § 552.301.

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Both SPC and Members have argued that their submitted pricing information, as well as other specified information, qualifies as a trade secret under section 552.110(a). In this regard, we note that pricing information that pertains to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314

S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, we conclude that neither party has established a *prima facie* case that the information pertaining to the pricing information is a trade secret because the information is specific to this contract only. See Open Records Decision No. 402 (1983). Thus, the pricing information may not be withheld under section 552.110(a). Members also argues that certain specific information “reveals the code for how Members arrives at its ultimate price.” However, we also find that this information is specific to the contract at issue and, therefore, may not be withheld under section 552.110(a) as a trade secret. Upon review of the remaining submitted information and arguments submitted by SPC and Members, we conclude that the information that we have marked in SPC’s bid package may be withheld as trade secret information under section 552.110(a). Upon further review, we find neither SPC nor Members has demonstrated that any of the remaining information is a trade secret under section 552.110(a).

SPC and Members also argue that portions of the information are excepted from disclosure under section 552.110(b). After a review of the arguments and submitted information, we conclude that both SPC and Members have made a specific factual or evidentiary showing as required by section 552.110(b) that the release of portions of their information would likely cause them substantial competitive harm. We have marked this information that may be withheld under section 552.110(b). We find that none of the remaining information at issue is excepted from disclosure under section 552.110(b). See Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov’t Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

With regard to the pricing information of Members, the entity awarded the contract, we further note that pricing information of a winning bidder is generally not excepted under section 552.110(b). See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). We also note that federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. See *generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. See Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). See Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

In summary, we have marked the information that may be withheld from SPC’s submitted proposal under section 52.110(a) and the information that may be withheld from SPC’s and

Member's proposals under section 552.110(b). The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

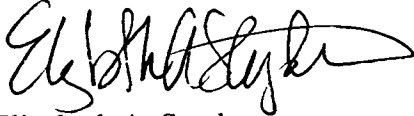
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Elizabeth A. Stephens  
Assistant Attorney General  
Open Records Division

EAS/krl

Ref: ID#225434

Enc. Submitted documents

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